United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-6111

No. 76-6111

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P/S

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SAMUEL D. MAGAVERN, As Executor and Trustee of The Last Will and Testament of MARGARET C. DUNCAN, Deceased,

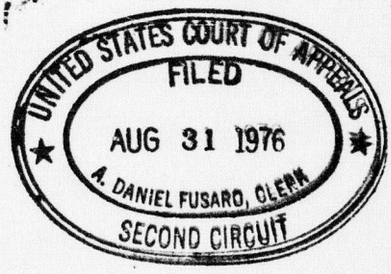
Plaintiff-Appellant

vs.

UNITED STATES OF AMERICA

Defendant-Appellee

CIVIL APPEAL
FROM UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF NEW YORK



BRIEF FOR PLAINTIFF-APPELLANT

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STATEMENT OF THE ISSUES

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II. WHETHER THE UNITED STATES, HAVING BEEN DULY CITED AND MADE A PARTY TO THE CONSTRUCTION PROCEEDING, CAN CLAIM, AFTER REFUSING TO ARGUE THE MERITS OF ITS POSITION AND REFUSING TO APPEAL FROM THE STATE COURT'S DECISION, THAT IT IS NOT BOUND BY THE STATE TRIAL COURT'S ADJUDICATION THAT THERE WAS NO PROPERTY OR RIGHTS TO PROPERTY IN THE TRUST HELD BY THE PLAINTIFF AS TRUSTEE, BELONGING TO DEBTOR, THOMAS W. DORAN, ONE OF THE BENEFICIARIES.

III. WHETHER THE FEDERAL COURT, ASSUMING ARGUENDO THAT THE UNITED STATES OF AMERICA IS NOT BOUND BY THE SURROGATE'S RULING, IS CORRECT IN HOLDING, CONTRARY TO THE SURROGATE'S DECISION AND THE SETTLOR'S EXPRESSED INSTRUCTIONS, THAT THE DEBTOR, THOMAS W. DORAN, HAD VESTED RIGHTS TO PROPERTY UNDER NEW YORK STATE LAW, RATHER THAN A MERE EXPECTANCY INTEREST AND THAT THEREFORE, THE GOVERNMENT'S LEVY IS VALID.

STATEMENT OF THE NATURE OF THE CASE AND FACTS

This is an appeal from the final, unreported decision (App. 46) of the United States District Court for the Western District of New York (Hon. John T. Curtin, D.J.). It originates from a motion for summary judgment in an action commenced by Samuel D. Magavern, as Trustee of the Trust under the Last Will and testament of Margaret C. Duncan, pursuant to Section 7426(a)(1) of the United States Code (Add. i), to declare a levy wrongful and to discharge the same. The levy was made on the purported basis that there was property or rights to property in the hands of the Plaintiff, as Trustee of the Last Will and Testament of Margaret C. Duncan, belonging to one of the beneficiaries, Thomas W. Doran, a debtor of the United States. Due to the death of the debtor some fourteen months after service of the levy, and after commencement of the actions referred to herein, there is no substantial money damages at stake. However, there are involved in this controversy, in addition to the money damages, substantial and important questions of law that create conflicts between the State and

Federal jurisdiction as to personal and state rights to justify a determination.

The Plaintiff herein, as Trustee of the Last Will and Testament of Margaret C. Duncan, petitioned the Surrogate's Court of Erie County, New York (which court, as the probate court of the Last Will and Testament of Margaret C. Duncan, appointed the Plaintiff as Trustee and has continuing jurisdction thereof) to determine, pursuant to Section 1420 of the Surrogate's Court Procedure Act of the State of New York (SCPA §1420)(Add.iii) the construction and effect of said will, in particular, Article III thereof, and to determine whether there was any property or rights to property in the hands of Plaintiff, as Trustee, belonging to the beneficiary, Thomas W. Doran, the subject of the levy. The levy purported to attach all property, rights to property, monies, credits and bank deposits in the Plaintiff's possession, belonging to one Thomas W. Doran, one of the beneficiaries of the trust set up in the Will. The question to be construed was whether the debtor had any property or rights to property to which the levy could attach. The

pertinent provision of the Trust at issue is contained in Article III of said Last Will and Testament and reads as follows:

> "1. This trust shall be held and administered for the benefit of the family group, consisting of those from time to time living of my husband, Matthew Duncan, my son, Thomas W. Doran, his children and the issue of his children. My Trustee shall pay over or use, apply and expend whatever part or all of the net income or principal (even to the point of exhaustion thereof) or both, thereof he shall deem proper or necessary in order to provide comfortable support, maintenance and/or education (at any level) to the individual members of the said family group. My Trustee shall not feel bound in making such payments, uses, applications or expenditures, to observe any rule of precept of equality as between the individual members of said family group." (emphasis added)

Due to the time limit to contest the levy, Plaintiff started this action. Prosecution thereof was delayed pending the decision of the Surrogate of Erie County.

The Surrogate rendered a decision In Re Will of Duncan, 80 misc. 2d 32, N.Y.S. 2d 788; App. 24) that

"[t]he only interest of Thomas

> W. Doran and the other beneficiaries is merely one of expectancy, and the trustee cannot be compelled to transfer to any member any part of the trust property." (80 Misc. 2d at p. 35, 362 N.Y.S. 2d at p. 791;

and that

> "the beneficiaries of the trust created under the Last Will and Testament of Margaret C. Duncan have no absolute right to receive income or principal from the trust and that therefore there is no property or rights to property belonging to the beneficiaries, specifically Thomas W. Doran, the subject of the levy." 80 Misc. 2d at pp. 35-36, 362 N.Y.S. 2d at p. 792.

In accordance therewith, the Surrogate entered his Order (App.21).

Upon the Surrogate rendering said decision and order, the Plaintiff moved for a summary judgment in this action to discharge the levy. The Federal Court concluded that

> "under New York State law, the beneficiary had 'rights to property' in that he had a right to a reasonable sum under the settlor's instructions for his 'maintenance and care,' and that therefore, the Government's levy is valid. The determination of the actual amount of the trust income and/or principal reached by the levy must await trial."

Plaintiff-Trustee's motion for summary judgment was denied and the Government's motion for partial summary judgment declaring the tax lien valid was granted.

Due to the death of Thomas W. Doran, and in the interest of expediency and the elimination of unnecessary litigation costs which would involve proceeding with the trial, the Plaintiff and the Government stipulated to the amount available as being $2,305.00 (App.59). This sum represents a calculation of the average amounts which the debtor received from the trust over the years, which payments to him were not commenced until 1968, some years after the death in 1965 of the decedent, the probate of her Will, the appointment of the Plaintiff as Trustee, and the commencement of the administration of the trust by Plaintiff-Trustee. See Estate Ledger (App. 60) referred to by Government and Federal Court.

ARGUMENT

POINT I

THE UNITED STATES GOVERNMENT, HAVING BEEN BROUGHT IN BY DUE PROCESS AS A PARTY TO THE CONSTRUCTION PROCEEDING IN THE

STATE COURT WAS BOUND BY THE DECISION AND ORDER OF THE STATE COURT.

A. THE STATE COURT HAD AND STILL HAS EXCLUSIVE AND CONTINUING JURISDICTION OVER THE ESTATE OF MARGARET C. DUNCAN, INCLUDING ITS PHYSICAL ASSETS.

It is well settled under the laws of the State of New York that the Surrogate's Court of the county in which a decedent dies a domiciliary has exclusive and continuing jurisdiction over the decedent's estate, including its physical assets, and has jurisdiction to determine the construction and effect of any provisions of such decedent's will. SCPA §§205 (Add. ii), 206 (Add.iii), 1420 (Add.iii). It is equally well settled that when two or more courts assert jurisdiction over the same res, the court whose jurisdiction first attaches has exclusive jurisdiction to hear the matter. United States v. Bank of New York and Trust Co., 296 U.S. 463, (1936).

B. THE STATE COURT PROCEEDING WAS IN REM AND NOT IN PERSONAM.

The assets of the estate consist of funds located in Erie County, New York and real estate situated entirely in the State of New York.

The presence of Plaintiff, as trustee, and the trust res within New York State provided the basis for the Surrogate Court's in rem jurisdiction. Central Hanover Bank & Trust Co. v. Peabody, 190 Misc. 66, 68 N.Y.S. 2d 256; Application of Chase Nat. Bank, 55 N.Y.S. 2d 470; In Re Gato's Estate, 276 App. Div. 651, 97 N.Y.S. 2d 181 (1st Dept. 1950); Markowitz v. Atlas Power Corp., 117 N.Y.S. 2d 130. In the alternative, the proceeding was quasi in rem. In Re Leverich's Will, 135 Misc. 774, 238 N.Y.S. 533, aff'd. 234 App. Div. 625, 251 N.Y.S. 870. Plaintiff was in possession of the trust res; not the Government. The relief sought had no element of personal claim or personal liability against the Government; it simply sought an adjudication of the rights of all interested persons, including the United States Government, in the trust res.

Clearly, the application for a construction is simply the determination of rights to property and therefore in rem in nature and not in personam.

C. THE UNITED STATES WAS A PROPER PARTY AS OF RIGHT.

It is well settled that in an action

or proceeding in which in rem or quasi in rem relief is sought, the Government can be made and brought in as a party to any such action or proceeding, upon being served with notice of the same, and is conclusively bound as to all matters determined therein. United States v. Bleasby, 257 F.2d 278 (3 Cir. 1958); State of New Jersey v. Moriarty, 268 F.Supp. 546, (D.N.J.) (1967); Restatement, Judgment, Sections 2, 3 and 32 (Add. iv). The Government was cited as an "interested person" in Plaintiff's petition in the Surrogate's Court and was served with notice of the same. The vitally important distinction between an in rem and in personam action or proceeding, is highlighted by Stapleton v. $2,438,110.00, 454 F2d 1210 (3d Cir. 1972) and the United States v. Bleasby, supra. The Bleasby court held that where the Plaintiff in the State Court action is in possession of the res and the relief sought is an adjudication of title thereto, the United States can be sued, without its consent, and is bound by the resultant in rem judgment establishing title to the res. Cf. Stapleton, supra (where the Government was in possession of the res and the

relief sought was in personam).

D. BOTH THE STATE AND FEDERAL COURT AGREE STATE LAW CONTROLLING.

The Courts both in the State of New York case and the case at bar agree that "[t]he threshold question in this case, as in all cases where the Federal Government asserts its tax lien, is whether and to what extent the taxpayer had "property" or "rights to property" to which the lien could attach. In answering that question, both federal and state courts must look to state law..." Aquilino v. United States, 363 U.S. 509 (1960), at pp. 512-513. Thus, it appears to be agreed that in determining what is "property" or "rights to property" the state law is controlling. However, the Federal Court seeks to nullify the Surrogate's decision, using as its authority, Commissioner v. Bosch, 387 U.S. 456, (1967), on the ground that the Federal Court is not conclusively bound by the State trial court's adjudication of property rights or characterization of property interest where the United States is not made a party to the proceeding.

The Federal Court rests its decision, (App. 46) herein appealed from, on the proposition that the State Court construction proceeding

was ex parte and not binding on it. There has been much written and said about the Bosch case. However, we submit that the purpose of the Bosch decision was to protect the Federal Government from being bound by an ex parte, non-adversary decision of the State Court, without a voice and therefore it would be discriminatory and prejudicial to it. This is not the issue in this case as the United States was made a party to and appeared in and filed memoranda of law with the State Court, in an adversary position, the Trustee having the duty, on behalf of the trust estate, to maintain its principal. See Surrogate's letter, dated September 9, 1974 (App. 31); Plaintiff's letter, dated June 19, 1975 (App. 29); and the particular words used by the State Court in its decision (App. 24) and order (App. 21). Therefore, it is clear that the State Court proceeding was neither ex parte nor was it non-adversary in nature.

The Bosch case further remains indecisive in that its application is limited to its particular facts and its holding is limited to the federal estate tax liability under a federal statue (26 U.S.C.A §2056) which,

as discussed at length by the Bosch Court, had a legislative history specifically directing that only "proper regard," not finality, was to be accorded to a state court's decree.

Therefore, Bosch is clearly distinguishable in that the United States was joined as a party by due process in the subject State Court proceeding, it appeared therein and filed memoranda of law therewith, and the State Court proceeding and its resultant judgment were in rem in nature.

It must further be pointed out that if we followed the Federal Court's reasoning and decision, that any time the Federal Government is made a party to an in rem action or proceeding involving property rights, or otherwise, or intervening in such an action or proceeding, that simply by contesting jurisdiction and choosing to do nothing, to wit: not appealing from the decision or taking part therein, it would automatically open the door for the Federal Courts to make a contrary decision. Such a result would clearly violate the state's rights and completely disregard the State of New York's legislative intendment and mandate

concerning will construction proceedings, to wit:

SCPA §1420.

> Proceeding for construction of will; effect of decree ..." 4. A decree in any proceeding authorized in this section or a decree settling an account of a fiduciary or a decree on probate which construes or interprets any portion of a will, unless reversed or modified on appeal, shall thereafter be binding and conclusive in all courts upon all parties to the proceeding and upon their successors in interest as to all questions of construction or interpretation of the will therein or thereby determined and of all rights and obligations of the parties involved in the construction, depending thereon, or resulting therefrom." (emphasis added) (Add.iii)

Even more importantly, by refusing to appeal, the Plaintiff would be prevented from complying with the other aspect of the Bosch case, which indicates that the Court must look to the State's highest courts or the best authority on state law. The Federal Court's rationale under the instant facts certainly cannot be the purpose of the Bosch decision; but, rather the purpose of Bosch is, as above stated, to make sure that the

United States Government would not be bound by an ex parte, non-adversary decision.

Therefore, the United States of America is conclusively bound, as a matter of law, by the Surrogate's decision that there was no property or property rights belonging to Thomas W. Doran, the debtor, that could be levied on by the United States. And the Federal Court erred, as a matter of law, in determining otherwise.

POINT II

THE CONTROLLING ISSUE IS THE CONSTRUCTION OF THE PROVISION THAT THE TRUSTEE "SHALL NOT FEEL BOUND IN MAKING SUCH PAYMENTS, USES, APPLICATIONS OR EXPENDITURES, (TO INDIVIDUAL NAME MEMBERS) TO OBSERVE ANY RULE OR PRECEPT OF EQUALITY AS BETWEEN THE INDIVIDUAL MEMBERS OF SAID FAMILY GROUP."

The Federal Court rests its decision (App.) holding that debtor, Thomas W. Doran, had "rights to property" under New York State law, primarily in attempting to distinguish cases cited by the Surrogate in support thereof, namely Matter of Connolly, 71 Misc. 388, 389, 130 N.Y.S. 194, 195 (Sur. Ct. Kings Co. 1911); Hamilton v. Drogo, 241 N.Y. 401 (1926).

Apparently the Federal Court, although its decision does not so state, attempts to indicate the court has a limited right to interfere if it appears that Trustee is exercising his discretion perversely or unreasonably. Cf. Matter of Connolly, supra. It does not seem relevant to the issues or the facts in this case. The Trustee simply turned to the Court having jurisdiction over the trust estate for a construction of the subject will. There is no claim anywhere throughout that the Trustee acted perversely or unreasonably.

This leaves two cases which the Federal Court relies on in holding contrary to the State Court. In Hamilton v. Dorgo, supra, the testatrix bequeathed to her trustee a sum of money in trust, during the life of her son, to apply the annual income "for the maintenance and support or otherwise, for the benefit of all or any one or more exclusively of the other or others of him, my said son, his wife and children or other issue as my trustees in their sole and uncontrolled discretion without being liable for the exercise of such discretion think fit." 241 N.Y. at p. 403. In that case, as in the

instant case, the court held that there was nothing that could be reached by levy and only in the event that the Trustee exercised an allotment in favor of the son, could it be attached. As under the facts of the instant case, the Hamilton court stated:

> "If ever the day of payment arises, the lien of the execution attaches...[however] in the present case no income may ever become due to the judgment debtor. We may not interfere with the discretion which the testatrix has vested in the trustee any more than her son may do so. Its judgment is final." 241 N.Y. at p. 404.

In accound, Myers v. Russell, 60 Misc. 617, 112 N.Y.S. 520; Brownell v. Leutz, 149 F.Supp. 98 (D.N.D. 1957); Restatement, Second, Trusts, §155, Comment (Add. iv) 2 Scott on Trusts (3d Ed) §155, (Add. v). The Federal Court, in attempting to distinguish the instant case from Hamilton, relies heavily upon the use of the word "exclusively" and the distinction of exclusiveness as pointed out by the New York Court of Appeals in a later case, Sand v. Beach, 270 N.Y. 281 (1936).

The Court, in the Sand case, which the Federal Court states is more similar to our

situation, construed the will of the testatrix which provided that the trustee appointed therein hold the trust fund

> "for the following uses and purposes, to wit: To receive the rents, income and proceeds thereof, and to pay the same either direct and in person to my nephew, Stanley Y. Beach, or for the use and benefit of my said nephew and those dependent upon him, during his lifetime, and in the manner and amounts, and at the times and for the purposes that said Trustee, or his successor or successors, in his discretion may deem best..." 270 N.Y. at p. 283.

Justice Lehman stated that,

> "[i]t was clear that the Testatrix intended to provide for the support of her spendthrift nephew and those dependent upon him and to make the interest of her nephew in that fund exempt from execution or other processes by which otherwise such interest or a part thereof could be applied in satisfaction of the debts of the beneficiary." 270 N.Y. at p. 283.

There is no claim that the Margaret C. Duncan Will intended to provide that the trust was a spendthrift trust, nor is there a provision therefor. The emphasis is on meeting the needs of any of the several eligible members of said group, including any amounts that may be

required for the maintenance or support of her husband, her son, his children, and the issue of his children or for the education (at any level) of the son's children and their children, authorizing expenditures even to the point of exhaustion. See Estate Ledger (App. 60). It is also to be noted that the trust was set up long before the debtor, Thomas W. Doran, became indebted to the United States Government.

A careful reading of Judge Lehman's well-reasoned opinion does clearly answer the question and issue involved herein. He states the following:

> "The trustee under the will is clothed with discretion whether to pay the rents, income and profits to the judgment debtor or to apply them to the use or benefit of the judgment debtor and those dependent upon him during his lifetime. We may not interefere with the discretion which the Testarix has vested in the Trustee. His discretion is limited, however, to the payment of the income direct to the judgment debtor or to its application for the benefit of the judgment debtor and those dependent upon him. If the trustee chooses the first alternative, then income from the trust fund will undoubtedly become due and owing to the judgment debtor and may be reached by execution. (Hamilton v. Drogo, 241 N.Y. 401). So the

courts below have decided, and to that extent their decision is not challenged. The question remains whether the judgment creditor may, by execution, reach the income of the fund in the event that the trustee, in the exercise of his discretion, chooses the second alternative and decides to apply the income of the trust fund for the use and benefit of the judgment debtor and his wife, who is dependent upon him.

"If the discretion of the trustee were wide enough to permit the trustee to pay to or apply the income of the trust fund to the use or benefit of some person other than the judgment debtor, then to the extent of such payment or application the income of the trust fund would in no sense, be due or owing to the judgment debtor. The income would then belong under the will to another person, and the judgment debtor would have no interest in it. So we decided in the case of Hamilton v. Dorgo, (supra). In that case the will of the testatrix provided that the trustee during the lifetime of her son apply the annual income of a trust fund 'for the maintenance and support or otherwise, for the benefit of all or any one or more exclusively of the other or others of him, my said son, his wife and children or other issue as my***discretion***think fit.' Thus choice of the person for whose benefit the income of the fund should be applied rested solely with the trustee, and if the trustee choose to apply the income exclusively for the benefit of

such wife or child.

> "Here the situation is quite different. The trustee cannot, in the exercise of his discretion, apply the income of the trust fund exclusively for the benefit of the wife of the judgment debtor. If he does not pay the income to the judgment ddbtor, the trustee must apply it for the use and benefit of the judgment debtor and his dependents. If the direction of the will had been to pay the income to the judgment debtor or to apply it for his support or benefit, the dependents of the beneficiary though not mentioned in the will, could still have demanded that provision be made from the income for their support. (citation omitted) Thus the express addition in the will of the words 'and those dependent upon him' does not detract from the right of the judgment debtor to require payment to him of the entire net income of the trust fund or its application for his use and benefit." (emphasis added) 270 N.Y. at pp. 284-286.

The State Court proceeding herein was brought for a construction of the meaning and effect of the provision of Article III of said will which is repeated here for convenience:

> "ARTICLE THIRD: 1. This trust shall be held and administered for the benefit of the family group consisting of those from time to time living of my husband, MATTHEW DUNCAN, my son, THOMAS W. DORAN, his children and the issue of his children. My Trustee shall pay over or use, apply and expend whatever part or all of the net

> income or principal (even to the point of exhaustion thereof), or both, thereof he shall deem proper or necessary in order to provide comfortable support, maintenance and/or education (at any level) to the individual members of said family group. My trustee shall not feel bound, in making such payments,uses, applications or expenditures, to observe any rule or precept of equality as between the individual members of said family group." (emphasis added)

The Federal Court's position herein that the son, Thomas W. Doran, has an absolute right to property, essential under law cited by the Court, is untenable.

First, it seems self evident that in authorizing the Trustee not to observe any rule or precept of equality as between the individual members, that equality begins at zero. The Federal Court in this case, however, would seem to preempt the testatrix's decision and express instructions and want to establish a platform whether $1.00 or $2,300 and to the extent of such platform or amount of support to deny the Trustee the testatrix's unequivocal instruction that he does not have to observe any rule or precept of equality.

Secondly, the word "individual" is used in referring to recipients of use in the singular

sense thus giving the trustee the right to distribute to anyone or more individuals.

Thirdly, an equally cogent argument is that the Trustee is authorized to expend income and principal to the point of exhaustion for education for the son's children or the issue of his children; exhausting the fund for education would completely rule out any support for the husband or the son. See Estate Ledger (App.60).

The Federal Court herein seeks to substitute his judgment, that there is equality required to the extent of support for the son. We submit that such a construction does violence to the plain and natural import of the words used. It is very clear that these words of art mean just what they say, to wit: that the trustee is given the absolute and exclusive right to exhaust principal and income for any one or more of the individuals for any of the purposes enumerated, as he, in his sole discretion deems proper or necessary, leaving only an interest of expectancy for Thomas W. Doran, the debtor herein.

The United States of America, as a creditor, has no greater rights than the

cestui que trust, Thomas W. Doran, (United States v. Lester, 235 F.Supp. 115), and the latter has no absolute right at all in the trust res, only an expectancy interest. The United States may not take one person's property to satisfy another person's obligation. United States v. Lester, supra.

CONCLUSION

Therefore, it is respectfully submitted that the United States of America, as a party to the State Court proceeding, having been brought in by due process, was bound as a matter of law, by decision and order of the State Court, which had jurisdiction over the res of the estate, and which determined that, under the decisions of law of the State of New York, there is no property or rights to property held by the trustee, the Plaintiff herein, belonging to Thomas W. Doran, which the United States' levy coult attach.

As a matter of law, the Federal Court erred in holding that under New York State law the beneficiary, Thomas W. Doran, had rights to property under New York law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a copy of the foregoing Brief for Plaintiff-Appellant, together with Appendix and Addendum to said Brief was served upon Roger P. Williams, Assistant United States Attorney personally, this 30th day of August, 1976.

Samuel D. Magruder

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SAMUEL D. MAGAVERN, As Executor and Trustee of The Last Will and Testament of MARGARET C. DUNCAN, Deceased

Plaintiff-Appellant

-vs-

AFFIDAVIT OF PERSONAL SERVICE

UNITED STATES OF AMERICA

Defendant-Appellee

STATE OF NEW YORK)
COUNTY OF ERIE) SS.:

ANTHONY D. MANCINELLI, being duly sworn, deposes and says:

That he is over eighteen years of age and not a party to this action.

That on the 30th day of August, 1976, at approximately 11:00 A.M., at the United States Courthouse, 68 Court Street, Buffalo, New York, deponent served a copy of the enclosed Plaintiff-Appellant's Brief, Addendum to Plaintiff-Appellant's Brief and Appendix to Plaintiff-Appellant's Brief by delivering to and leaving with ROGER P. WILLIAMS, Assistant United States Attorney, personally, true copies thereof.

/s/ ANTHONY D. MANCINELLI

Sworn to before me this
30th day of August, 1976.

Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 19 78